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No. 98-296

In The

Supreme Court of the United States

OCTOBER TERM, 1998

LEGAL AID SOCIETY OF HAWAII, *et al.*,
Petitioners,

v.

LEGAL SERVICES CORPORATION and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF THE LEGAL SERVICES CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly found that the restrictions on the activities of Legal Services Corporation ("LSC") grantees contained in the 1996 and 1997 Omnibus Appropriations Acts, Pub. L. No. 104-134, 110 Stat. 1321, Pub. L. No. 104-128, 110 Stat. 3009 ("1996 and 1997 Acts"), and LSC's regulations implementing those restrictions, 45 C.F.R. Part 1610, do *not* impose an unconstitutional condition on Petitioners' exercise of First Amendment rights.

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STATEMENT OF THE CASE

I. ORIGINS AND PURPOSE OF THE LSC PROGRAM

The 1974 Legal Services Corporation Act ("1974 Act") established an independent, nonprofit corporation to provide funding for basic legal services to indigent persons. Pub. L. No. 93-355, 88 Stat. 378 (1974) (*codified as amended*, 42 U.S.C. §§ 2996 *et seq.* (1994)). The text and legislative history of the 1974 Act establish three basic principles relevant to this case: *first*, the Legal Services program is designed as a selective subsidy program that relies on both federal monies and funding from other sources; *second*, the mission of the program is to provide "bread and butter" services to meet the day-to-day legal needs of the poor; and *third*, Congress intended that the program remain strictly apolitical.

In establishing the Legal Services program, Congress created a grants-in-aid program in which the Legal Services Corporation ("LSC") distributes funds appropriated by Congress on a yearly basis to local grantee organizations which currently compete for funding by submitting detailed applications to LSC describing their proposed activities. *See* 42 U.S.C. §§ 2996b(a), 2996e(a); Supplemental Excerpts of Record ("S.E.R.") 56. Congress envisioned that grantees would generate additional (nonfederal) financial support for activities conducted under the program's auspices. *See, e.g.*, 42 U.S.C. §§ 2996e(a)(2), 2996i(c). Although no specific matching formula is required, applicants must describe a strategy for attracting non-LSC funds. As a practical matter, virtually all LSC grantee programs are funded with a combination of LSC and non-LSC funds from public and/or private sources. *Id.*; Pet. 106a.[1/]

[1/] For example, Petitioner Legal Aid Society of Hawaii ("LASH") generated 72% of its 1997 yearly budget from nonfederal sources; (continued...)

Congress has repeatedly emphasized that the LSC program exists primarily to provide *basic* legal services to the poor. As one Member stated at LSC's inception, grantee lawyers should be "preoccupied with day-to-day problems involving housing, domestic relations, consumer affairs, and employment" instead of "spending their time reforming laws they find discriminatory against the poor through class action and test-case litigation." 119 Cong. Rec. 20688 (1973) (Rep. Biester).[2/] Although the 1974 Act allowed some additional activities, the legislative history makes clear that Congress intended for the LSC program to emphasize individual cases in consumer and family law, housing, and the like.[3/] This focus on "bread and butter" services, 142 Cong. Rec. H8189 (July 23, 1996) (Rep. Torkildsen), defines the political consensus that has sustained LSC from 1974 to the present.

[1/](...continued)
Petitioner Alaska Legal Services Corporation ("ALSC") 59%; and Petitioner Legal Aid Society of Orange County ("LASOC") 21%. S.E.R. 2-3, 5-6. For FY 1996, Petitioners Legal Services of Northern California ("LSNC") and San Fernando Valley Neighborhood Legal Services ("SVNLS") generated 49% and 44% of their respective budgets from nonfederal sources. S.E.R. 3-4.

[2/] *Accord* H.R. Rep. No. 95-310, at 34 (1977) ("The purpose of this legislation should be to provide traditional legal representation for the poor.") (views of Rep. McClory); *see also* 142 Cong. Rec. H8178 (July 23, 1996) (describing "the purposes which we all endorsed, to meet the day-to-day legal problems of the poor") (Rep. Fox); *id.* at H8180 ("[T]hey are supposed to be doing ham and eggs work for poor people.") (Rep. Hunter).

[3/] The debates on the 1996 Act reflect a similar focus. *See, e.g.*, 141 Cong. Rec. S18160 (Dec. 7, 1995) (emphasizing "such routine legal matters as consumer problems, housing issues, domestic and family cases, and . . . public benefits") (Sen. Sarbanes).

Congress safeguarded this focus in the 1974 Act itself. Section 2996(5) stated that "[t]he legal services program must be kept free from the influence of or use by it of political pressures," and other provisions barred political activity by LSC or its grantees.[4/] These provisions were accompanied by specific limits on LSC activities to keep LSC clear of politically controversial areas. The 1974 Act prohibited litigation concerning school desegregation, abortion, and "draft-dodgers." 42 U.S.C. §§ 2996f(b)(8)-(10). The 1974 Act also limited criminal representation, class actions, and fee-generating cases. *Id.* §§ 2996e(d)(5), 2996f(b)(1)-(4). Most of these limitations applied even to activities funded entirely by private donors. *See id.* § 2996i(c) ("NonFederal funds [except public and tribal funds] received for the provision of legal assistance shall not be expended . . . for any purpose prohibited by this subchapter.").

Congress, moreover, has seen these substantive limitations as critical in realizing the 1974 Act's purpose of keeping LSC apolitical. As Representative Butler observed in 1977, "part of the reason for [LSC's] success in avoiding the 'political thicket' and controversy has been some of the restrictions we placed in the original act of 1974." H.R. Rep. No. 95-310, at 31 (1977) (supplemental views).

Accordingly, far from providing comprehensive legal services to the poor, the Legal Services program has always had a limited focus and has made grant awards contingent on the willingness of recipients to pursue the program's objectives.

[4/] *See* 42 U.S.C. § 2996e(d)(3) (barring campaign contributions by LSC or its grantees); *id.* § 2996e(d)(4) (barring all activities "advocating or opposing any ballot measures, initiatives, or referendums"); *id.* § 2996f(5) (restricting lobbying).

II. THE 1996 COMPROMISE

In 1995 and 1996, the LSC program came under new pressure due to budgetary constraints and a perception by some in Congress that LSC was unduly influenced by "liberal activists who favor a militant agenda." 141 Cong. Rec. S14592 (Sept. 29, 1995) (Sen. Gramm). Congress rejected efforts to kill the program altogether, in favor of a bipartisan proposal that reduced LSC's appropriation, added further subject-matter limitations, and extended those limits to cover *all* funds of LSC grantees. Congress emphasized that "[t]hese restrictions are to ensure that funding is used to provide the traditional legal services that are most needed by poor people." 141 Cong. Rec. S14605 (Sept. 29, 1995) (Sen. Stevens); *see also id.* at S14590 ("[T]hese restrictions provide the necessary guidance to take Legal Services back to its primary mission.") (Sen. Kassebaum).

The Congressional debates show that the limitations included in the 1996 and 1997 Acts were an effort to *save* LSC's basic mission through compromise, rather than a hostile attempt to eliminate the program.[5/] "While some may not like these restrictions," Senator Domenici explained, "they are necessary to . . . protect LSC from the negative perceptions of those who wish to see its termination." 142 Cong. Rec. S1963 (March 13, 1996). Critics of LSC remain vigilant, however, and strict adherence to the restrictions in the 1996 and 1997 Acts remains essential to prevent the legislative compromise from unraveling. S.E.R. 25-26, 87.

[5/] Reports of the 1996 and 1997 Acts do not discuss the purposes of the challenged restrictions in detail. The Senate's report on S.1221, a contemporaneous but unsuccessful effort to codify identical restrictions in the LSC Act itself, explained that such restrictions would "refocus LSC on its primary mission, which is to provide basic legal services to indigent American citizens." S. Rep. No. 104-392, at 2 (1996).

The limitations contained in the 1996 and 1997 Acts fall into four categories:[6/]

1. ***Lobbying Limitations***. A grantee attorney may not participate in legislative or administrative advocacy. *See* 45 C.F.R. Part 1612. The attorney may, however, use non-LSC funds to participate in public rulemaking of any sort (including reform of a welfare law), 45 C.F.R. § 1612.6(e); to respond to written requests for information from agencies or legislatures, *id.* § 1612.6(a); and to lobby for funding of the grantee organization. *Id.* § 1612.6(f); S.E.R. 48-49.

2. ***Subject Matter Limitations***. A grantee attorney may not participate in litigation, or initiate lobbying or rulemaking, that involves an effort to reform a Federal or State welfare system. *See* 1996 Act §§ 504(a)(2)-(6), (12), (16), 504(b), 504(d)(1), 504(e); 45 C.F.R. Parts 1612, 1639. (A grantee attorney may, however, litigate to enforce existing welfare law. 45 C.F.R. § 1612.5; S.E.R. 49-50.) Grantee attorneys may not provide legal assistance (other than services related to domestic violence) to ineligible aliens. *See* 1996 Act § 504(a)(11); 1997 Act § 502(a)(2)(C); 45 C.F.R. Part 1626; S.E.R. 50. Nor may grantee attorneys defend a person being evicted from public housing if that person is charged with a drug offense. *See* 1996 Act § 504(a)(17); 45 C.F.R. Part 1633; S.E.R. 52. The 1996 and 1997 Acts also retain and, in some cases, extend or add to pre-existing limitations on litigation involving prisoners, abortion, and redistricting. *See* 1996 Act §§ 504(a)(1), (14), (15); 45 C.F.R. Parts 1632, 1637; S.E.R. 50-52.

[6/] All of these rules are subject to the requirement that "[legal services] attorneys must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. § 2996(6); *see also id.* §§ 2996e(b)(3), 2996f(a)(1).

3. ***Litigation Rules.*** The 1996 and 1997 Acts bar grantees from initiating or participating in class actions, *see* 1996 Act § 504(a)(7); 45 C.F.R. Part 1617; however, grantees may handle the case for an individual client or refer prospective class action clients elsewhere. S.E.R. 48, 53. Grantee attorneys also may not claim, collect, or retain attorney's fees, *see* 1996 Act § 504(a)(13); 45 C.F.R. Part 1642,[7/] except where court appointments or court-imposed sanctions are involved. *Id.*; S.E.R. 53.

If a grantee attorney feels that prohibited advocacy is in a client's best interests, he may refer the client to an organization not subject to the limitations. Furthermore, full-time employees may engage in prohibited activities such as administrative and legislative advocacy in their individual capacity on their own time (*e.g.*, on leave or outside of business hours). S.E.R. 34. The regulations also permit part-time employees — including lawyers — to engage in prohibited activities as employees of non-LSC organizations that are financially and physically separate from the LSC grantee. S.E.R. 34-35, 87-88.

4. ***Funding Rules.*** The most significant change in the 1996 and 1997 Acts is the application of the restrictions to *all* of a grantee's funds, and to any entity receiving a transfer of LSC funds. *See* 1996 Act § 504(d); 45 C.F.R. Part 1610. Under prior law, all restrictions applied to a recipient's LSC funds and most — including restrictions on politically controversial subject areas, *see* 45 C.F.R. Part 1610 (1976) — also applied to a recipient's private funds; no limitations applied to a recipient's tribal or nonfederal public funds.

[7/] The rule covers private attorneys *paid* by grantees to handle cases, but does *not* apply to outside attorneys working *pro bono*. 45 C.F.R. § 1642.4.

III. LSC'S IMPLEMENTING REGULATIONS AND THE CURRENT LITIGATION

Almost immediately after the passage of the 1996 Act, LSC began drafting implementing rules to ensure that grantees did not engage in prohibited activities. *See* S.E.R. 47. The initial regulations permitted organizations affiliated with grantees to engage in prohibited activities so long as those organizations were not effectively controlled by the LSC grantee. *See* S.E.R. 69-72. Effective control was determined through an "interrelated organizations" test that involved consideration of factors such as overlapping directors and shared funding. S.E.R. 66.

Pursuant to the new statutory restrictions, LSC managed the withdrawal of grantee organizations from 630 class actions, 2991 cases for ineligible aliens, and 428 prisoner cases nationwide. S.E.R. 65. These withdrawals usually involved settlement of litigation, securing replacement counsel, or shifting full responsibility to existing co-counsel. S.E.R. 64-66. Successor counsel or co-counsel were chosen because they were willing and competent to represent LSC's indigent clients. S.E.R. 22.

Although they raised no constitutional objections in the rulemaking proceeding, *see* S.E.R. 37-44, 47-48, Petitioners filed this lawsuit on January 9, 1997, challenging the facial constitutionality of the restrictions and implementing regulations, and seeking a preliminary injunction. The district court evaluated Petitioners' likelihood of success on the merits in terms of "whether adequate, alternative channels exist for the organizations to voice their un-subsidized opinion." Pet. 91a. Because LSC's "interrelated organizations" policy precluded the establishment of non-restricted affiliates controlled by an LSC grantee and funded solely with non-LSC monies, the district court found that LSC had failed to allow for adequate alternative channels under *Rust v. Sullivan*, 500

U.S. 173 (1991), *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), and *FCC v. League of Women Voters*, 468 U.S. 364 (1984). Pet. 90a-97a. The court rejected Petitioners' arguments that restrictions on class actions, claims for attorney's fees, and representation of ineligible aliens implicated any constitutional rights. Pet. 79a-83a. Those restrictions were therefore excluded from the preliminary injunction granted on February 14, 1997. Pet. 103a-104a.

LSC undertook a careful review of its implementing rules in response to the district court's constitutional concerns. New interim rules deleted restrictions on transfers of non-LSC funds and created an avenue for expression through "interrelated organizations" that were "physically and financially separate" from LSC grantees. 62 Fed. Reg. 12101, 12104 (March 14, 1997). Commentary to those rules explained that the physical and financial separation requirement was modelled directly on the Title X regime upheld in *Rust*. After receiving comments from Petitioners and others, LSC promulgated a Final Rule on May 21, 1997. That rule deleted all reference to the prior "interrelated organizations" test — which Petitioners and others had found confusing — and removed minor variations in phrasing between LSC's program integrity requirements and those sustained in *Rust*. 62 Fed. Reg. 27697-98.

On cross-motions for summary judgment, the district court upheld in their entirety the 1996 and 1997 Acts and LSC's revised implementing regulations. Reading the revised regulations "as allowing a LSC funded organization to control another organization that engages in restricted activities so long as all the insularity and separate incorporation requirements of the regulations are satisfied," the district court found that "alternative channels exist for LSC-funded organizations to exercise their constitutionally protected rights such as lobbying the legislature." Pet. 38a. The court noted that "[t]he insularity requirements have already been upheld

in *Rust* and the Court finds Plaintiffs' many efforts to distinguish the case unpersuasive." *Id.* Although it recognized that "[u]nlike *Rust* . . . the regulations here also require that an affiliate be separately incorporated," the court "[did] not find that the separate incorporation requirement limits the availability of alternate channels any more than the insularity requirement alone did in *Rust*." Pet. 38a-39a. Finally, the court found that the regulations "do not violate Plaintiffs' Due Process or Equal Protection rights." Pet. 39a.

On May 18, 1998, the Ninth Circuit Court of Appeals affirmed the district court. In an opinion authored by Justice Byron White (sitting by designation), the court of appeals found the new LSC rules "nearly identical to [those] upheld in *Rust*" and concluded that there is "no basis for distinguishing this case from *Rust*." Pet. 18a. Justice White rejected as "misplaced" Petitioners' argument that the LSC program integrity rules differ from those in *Rust* simply because they "apply to 'recipients,' and not 'projects.'" Pet. 22a. The court held that, under *Rust*, *TWR*, and *League of Women Voters*, the constitutional inquiry turns not on terminology but on whether the regulations "prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program." Pet. 22a.

The court of appeals, moreover, held that Petitioners' laundry list of "hardships" are of no constitutional moment because they are (a) unsupported by any "substantial evidence . . . concerning how the LSC regulations will be . . . applied" *and* (b) inconsistent with the "text of the regulations" which calls for a case-by-case approach. Pet. 25a. Given the facial nature of Petitioners' challenge, the court refused to invalidate LSC's program integrity rules based on "hypothetical application[s]." Pet. 25a. In any event, the court observed, compliance burdens are of no constitutional significance if the requirements of *Rust* are fulfilled. Pet. 26a. Nor were Petitioners' efforts to "re-read"

Rust in light of *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), successful. The court of appeals held that, unlike the Student Activities Fund in *Rosenberger*, the LSC program involves the government appropriating public funds "to promote a particular policy of its own," Pet. 27a, *not* to encourage a diversity of views from private speakers.

Finally, the court rejected Petitioners' contention that strict scrutiny applies in this case. The court explained that nothing in *Rust* requires the government to establish a compelling interest before imposing restrictions to ensure that its funds are used for non-prohibited purposes. Pet. 27a-28a.[8/]

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any court of appeals. Indeed, the Court just this last term in *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998), clarified the meaning and scope of the unconstitutional conditions doctrine in a manner that is consistent with the decision below. Nonetheless, Petitioners try to make this case appear more complicated and unique than it is. They argue that the court of appeals "misapplied" *Rust* by ignoring critical distinctions between that case and this one, and that the Supreme Court's "trilogy" of subsidy cases requires the application of some sort of "compelling interest" test (which Petitioners now recast as a "no more restrictive than necessary" test). In fact, the alleged distinctions between *Rust* and the present case are either immaterial or irrelevant to the

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[8/] The Ninth Circuit also vacated the district court's judgment that the LSC restrictions do not violate the Due Process and Equal Protection rights of legal services clients, ruling that the Petitioners have no standing to raise these issues. Petitioners do not seek review of this ruling.

constitutionality of the LSC scheme. The Court's subsidy cases, moreover, do not require a compelling interest test, as last term's *Finley* decision reaffirmed. In short, there is no reason for this Court to grant the petition.

I. THIS CASE DOES NOT MEET THE COURT'S STANDARDS FOR GRANTING *CERTIORARI*.

Nothing in the petition indicates that this case warrants discretionary review by this Court under Supreme Court Rule 10.1. Petitioners identify no conflict among the circuits on any issue relating to the 1996 and 1997 Acts and implementing regulations involved in this case. Every federal court to address the issue — the district court and the Ninth Circuit in this case, and the district court for the Eastern District of New York in *Velazquez v. LSC*, 985 F. Supp. 323 (E.D.N.Y. 1997) — has held that the challenged restrictions are constitutional.[2/]

Nor is there any warrant for taking this case in order to "consider the relationship between the unconstitutional conditions doctrine and the authority of Congress to determine the conditions for use of its own funds." Pet. 16. As demonstrated below, the Ninth Circuit's decision involved nothing more than the application of well-settled law articulated in this Court's conditional spending cases — *Rust*, *TWR*, and *League of Women Voters*. To the extent that the outer limits of the unconstitutional conditions doctrine remain somewhat unclear, this case offers little opportunity to clarify them; the challenged restrictions, after all, conform as strictly as possible to the standards upheld in *Rust*.

In any event, this Court undertook to clarify the government's authority to impose restrictions on grants for

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[2/] The *Velazquez* case is currently pending in the Second Circuit (No. 98-6006).

expressive activity last term in *Finley*. Petitioners have not argued that the decision below conflicts with *Finley* in any significant way.[10/] The appropriate course is to allow the lower courts an opportunity to interpret and apply *Finley* before taking another case on the issue. Only then will this Court know what issues — if any — remain for clarification.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE LSC RESTRICTIONS DO NOT IMPOSE AN UNCONSTITUTIONAL CONDITION ON PETITIONERS' EXERCISE OF FIRST AMENDMENT RIGHTS.

A. The Court of Appeals Correctly Applied This Court's Unconstitutional Conditions Decisions.

This Court's trilogy of cases concerning the government's ability to place limits on subsidy programs involving expression establish three basic principles: (1) the government may place limitations on programs it funds in order to avoid

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[10/] Petitioners mention *Finley* only twice, each time in a footnote. While they suggest that *Finley* supports a claim that Congress sought to restrict the speech of LSC grantees based on the viewpoints they espoused, Pet. 23 n.21, the district court correctly noted that Petitioners had waived any viewpoint claim. *See* Pet. 66a n.20. Petitioners' second reference to *Finley*, *see* Pet. 29-30 n.31, is an attempt to distinguish *Finley*'s rejection of a facial challenge. As demonstrated *infra*, at Section II.B.3., the effort fails. Moreover, while Petitioners have at times argued that this case is not covered by the facial challenge doctrine simply because it involves a free speech claim, the court of appeals resolved that question against them, Pet. 16a, and they have not included it within the "question presented" in their petition. Petitioners suggest that "the instant case also fits comfortably within the standard First Amendment paradigm in which facial challenges are entertained for overbreadth and vagueness," Pet. 30 n.31, but the district court correctly noted that they "have not alleged that the restrictions are vague or overbroad." Pet. 49a. In any event, this Court applied the facial challenge doctrine to a nearly identical First Amendment claim in *Rust* itself. *See* 500 U.S. at 183.

subsidizing activity it does not wish to support, *TWR*, 461 U.S. at 546; (2) when it does so, the government must leave open adequate alternative channels outside the scope of the government's program for those accepting government funding to exercise their constitutional rights using nonfederal funds, *League of Women Voters*, 468 U.S at 400; and (3) the government may require that any alternative channels for expression conducted with nonfederal funds be physically and financially separate from the subsidized activity, *Rust*, 500 U.S. at 190-91. LSC's program integrity rules are plainly constitutional under this jurisprudence.

1. LSC's Program Integrity Rules Are Constitutional Under *Rust*.

That LSC modelled its revised regulations on the Title X regime upheld in *Rust* is undisputed. *See* Pet. 19a-21a. This choice reflects several relevant similarities between the legal services and family planning contexts. Both involve confidential professional counseling that covers a wide range of topics; both sets of professionals have significant ethical duties to their clients (although the LSC regime provides specific statutory protection for activity required by a lawyer's ethical duties that was absent in *Rust*, *see* 42 U.S.C. § 2996(b)[11]); and while both medical and legal services can be allocated between government-funded and non-funded activities through mere bookkeeping arrangements, in both cases the provision of subsidized and non-subsidized activities by the same staff, under the same roof, raises significant potential for indirect subsidies and for public misperception about the scope of the government's support.

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[11] *See supra*, note 6. In other words, if there is a conflict between the LSC program restrictions and the ethical rules governing the attorney in question, it is the program restrictions that must yield.

Petitioners forcefully urged the district court to focus on *Rust* at the preliminary injunction phase, Pet. 47a-48a, and LSC rewrote its rules in response to the district court's constitutional concerns. LSC's program integrity rules permit a grantee to create an affiliate free from the challenged restrictions, so long as the affiliate is "physically and financially separate" from the LSC grantee, and the entities have "objective integrity and independence from [one another]." 45 C.F.R. § 1610.8(a). This physical and financial separation requirement was borrowed directly from the program integrity requirements upheld in *Rust*. *See* 42 C.F.R. § 59.9 (1990) ("A Title X project must be organized so that it is *physically and financially separate*" from prohibited abortion activities, and must have "an *objective integrity and independence* from prohibited activities.") (emphasis added). As the court of appeals explained, LSC's rules determine physical and financial separation based on factors virtually identical to those approved in *Rust*. Pet. 19a-21a. Moreover, like the Title X program, program integrity under LSC's rules is determined "on a case-by-case basis . . . based on the totality of the facts." 45 C.F.R. § 1610.8(a)(3). So long as the affiliate is separately incorporated and receives no LSC funds, "[t]he presence or absence of any one or more [other] factors will not be determinative." *Id.*

In one important way, the LSC rules are *more* flexible and permissive, for purposes of the First Amendment, than the program integrity rules in *Rust*. Unlike Title X, which totally banned discussions of, and referrals to, abortion service providers, LSC's rules impose no "gag rule" forbidding grantees to mention prohibited litigation options to clients, or to refer clients directly to the grantee's affiliate or another independent entity that engages in restricted activities.

Notwithstanding their reliance on *Rust* at the preliminary injunction stage, once LSC revised its regulations to conform

to *Rust*, Petitioners abruptly distanced themselves from the case.[12/] Their efforts to distinguish *Rust*, however, are wholly without merit.

2. Nothing Turns on a Distinction Between "Projects" and "Recipients."

Petitioners place great weight on the fact that the Title X regulations restricted "*projects*" while the LSC regulations restrict "*grantees*." Pet. 19. But as the court of appeals correctly recognized, the proper constitutional test is not whether 45 C.F.R. uses the same terminology as 42 C.F.R., but whether LSC's regulations prevent grantees from engaging in constitutionally protected activity outside the scope of the federally funded program. Pet. 22a; *Rust*, 500 U.S. at 197. The LSC regulations satisfy this test.

Rust involved a structure where abortion and family-planning services had to be conducted by physically and financially separate "projects," but those programs could be operated under the auspices of one single incorporated "recipient." LSC's rules permit the "recipient" grantee and unrestricted affiliate to be under common control, but require the entities to be separately incorporated as well as physically and financially separate. The *only* difference between the two structures is that, in *Rust*, a single corporate entity was permitted to engage in both subsidized and restricted activities, while here those activities must be carried out through separately incorporated affiliates. As the Court noted in *TWR*, the requirement of separate incorporation presents no constitutional difficulty. 461 U.S. at 544 n.6.

[12/] *See* Pet. 47a-48a ("Plaintiffs argued rather vehemently in the motion for a preliminary injunction that *Rust* applied to this case . . . . Now that the LSC has attempted to comply with the dictates in *Rust*, however, the Plaintiffs argue that *Rust* does not apply.").

3. The LSC Program Does Not Fit Within a "Traditional Sphere of Expression" Exception.

Petitioners contend that the LSC program falls within a "traditional sphere of expression" exception to the government's broad authority to limit the programs it funds. Petitioners seek refuge in a passage in *Rust* which explains that the existence of a government subsidy "does not justify the restriction of speech in areas that have been 'traditionally open to the public for expressive activity,'" or in areas "'expressly dedicated to speech activity.'" *Rust*, 500 U.S. at 199-200, *citing United States v. Kokinda*, 497 U.S. 720 (1990); *Hague v. CIO*, 307 U.S. 496 (1939); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S 37 (1983). Pet. 17.

Petitioners' argument is nothing more than a belated and misplaced attempt to shoehorn the LSC program into this Court's public forum cases. Petitioners, however, have never alleged, much less proven, that the LSC program is a public forum. Indeed, contrary to their contention that the LSC program is intended to provide "comprehensive" legal services to the poor, Pet. 21, LSC's organic statute limits the extent of the program in many significant ways.[13/]

These restrictions — which existed long before the restrictions challenged in this case — belie any attempt by Congress to provide "general access" to the Legal Services program, *see Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1642 (1998), or to "encourage a diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834.

[13/] As explained *supra* at pp. 1-4, LSC's organic statute sets forth detailed qualifications for participation in the program, sharply limits the subject matter of included advocacy, and defines LSC's purpose as meeting the basic legal needs of poor people rather than facilitation of open-ended expression of any kind.

Indeed, as in *Forbes*, LSC funding is made available to grantees only after "individual, non-ministerial judgments as to which of the eligible [applicants] would participate." 118 S. Ct. at 1642. The LSC program should therefore be evaluated as a nonpublic forum, and any "reasonable" regulation of access that does not discriminate on the basis of viewpoint must be upheld. *Id.* at 1643.[14/]

To be sure, *Rust* acknowledged that "[i]t could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." 500 U.S. at 200. However, if the lawyer-client relationship were a "'traditional sphere' of First Amendment activity," Pet. 21, it would be a highly regulated one. It is hard to imagine, for example, a more content-based restriction on speech than Fed. R. Civ. P. 11. Subjecting such regulations to strict scrutiny under the First Amendment would radically reshape the regulation of lawyers in this country. Moreover, any reasonable exception for professional relationships would be coextensive with the ethical duties implicit in those relationships. Here, the statute explicitly exempts activity *required* by an attorney's ethical obligations from the restrictions in the challenged regulations. *See supra*, notes 6 and 11. Plaintiffs thus fit *within* the rule of *Rust* — not the exception.

[14/] *See also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 805 (1985) (finding that the Combined Federal Campaign was a nonpublic forum based on "selective access, unsupported by evidence of a purposeful designation for public use").

4. *Rust* Cannot Be Distinguished on the Ground That It Involved a Government Message.

Petitioners place great weight on this Court's characterization of *Rust* as a case in which the government "used private speakers to transmit specific information pertaining to its own program." *Rosenberger*, 515 U.S. at 833. Based on this characterization, Petitioners would hold *Rust* inapplicable to any case lacking a specific, articulable government message. Even if the *Rosenberger* gloss on *Rust* could somehow supplant the *Rust* opinion, Petitioners would nonetheless be mistaken.

As Justice White recognized below, the critical distinction in *Rosenberger* was between cases where the government has "expend[ed] funds to encourage a diversity of views from private speakers," Pet. 27a (*quoting Rosenberger*, 515 U.S. at 834), and cases where "the government [has] appropriate[d] public funds to promote a particular policy of its own." Pet. 27a (*quoting Rosenberger*, 515 U.S. at 833). Justice White properly placed this case in the latter category, finding that "[l]ike the Title X program in Rust, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas." Pet. 27a.

This Court's decision last term in *Finley* confirmed Justice White's interpretation of *Rosenberger*. In *Finley*, the Court expressly declined to apply *Rosenberger*'s rule of strict scrutiny, because "[i]n the context of arts funding . . . the Government does not indiscriminately 'encourage a diversity of views from private speakers.'" 118 S. Ct. at 2178 (*quoting Rosenberger*, 515 U.S. at 834). *Finley* thus makes clear that it is the government's intent to "encourage a diversity of views from private speakers," rather than the absence of an articulable government "message," that triggers *Rosenberger*'s more demanding standard.

Where the government pursues some specific policy objective of its own — such as subsidizing the provision of family planning or legal services in certain limited situations — *Rust*'s analysis retains its full force. Indeed, Justice O'Connor's opinion in *Finley* reiterated that "as we held in *Rust*, Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.'" 118 S. Ct. at 2179 (*quoting Rust*, 500 U.S. at 193). The policy objectives in this case are much more apparent than in *Finley*, where the only limitation on the government's broad policy to promote diverse views was the requirement of "artistic excellence."[13/]

In any event, this case would pass muster even under a government "message" standard. As this Court made clear last term in *Forbes*, decisions concerning the "selection" or "compilation of the speech of third parties" constitute "communicative acts." *Forbes*, 118 S. Ct. at 1639 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995)).[14/] This is true, moreover, even when the entity doing the selection is a state actor. *Id.* Congress's expression of a policy to use third-party grantees to promote legal services in some areas — such as landlord-tenant or consumer law cases — but not in others

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[13/] As in *Finley*, LSC awards grants on a competitive basis according to the degree to which an applicant is likely to further the government's policy objectives. *See* 118 S. Ct. at 2179 (noting that "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake").

[14/] *Forbes* further confirms that the government may and does create limited public fora for speech challenging current government policy.

thus amounts to a "message" within the broad meaning of that term recognized in this Court's precedents.

B. LSC's Program Integrity Rules Are Not Unconstitutionally Burdensome.

Petitioners argue that reliance on *Rust* in this case is too "mechanistic," Pet. 18, because it ignores the unique burdens imposed on grantees by the LSC program integrity rules. As the court of appeals correctly recognized, this argument is erroneous for several reasons.

1. The Potential Burden of Compliance With LSC's Eligibility Requirements Does Not Raise Constitutional Questions.

Although it may well be more difficult to run "physically and financially separate" operations than commingled ones, the government's right to require objective separation between activities it wishes to fund and activities it does not wish to fund is not limited by the cost of compliance. The *Rust* plaintiffs, like Petitioners here, argued that program integrity rules requiring separate facilities and personnel impose unconstitutional burdens upon a federal grantee's operations.[15/] This Court has thus seen Petitioners' burden argument before — and has rejected it. *See Rust*, 500 U.S. at 191 (holding that the program integrity requirements "do not raise . . . 'grave and doubtful constitutional questions.'"). As the court of appeals correctly understood, *see* Pet. 26a,

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[15/] *Compare, e.g.*, Petitioners Brief in *Rust* at 27 ("[S]ection 59.9 [program integrity] severely impairs and may render physically impossible the effort of Title X grantees to engage in protected speech by consolidating programs supported with financially segregated funds.") (S.E.R. 100) *with* Pet. 28 ("LSC grantees are constrained by . . . restrictions which require them to operate under a system of mandated inefficiency (at the very least) or outright disability (frequently).").

nothing in *Rust* suggests that the constitutionality of the Title X regulations turned on a "balance of hardships," or that the burdens associated with program integrity compliance were even *relevant* to an unconstitutional conditions claim, as long as the recipient is not barred from pursuing prohibited activities outside of the federally funded program.

Rust's holding regarding the economic burdens of program integrity compliance is consistent with this Court's other unconstitutional conditions cases, in which the economic feasibility of exercising a right does *not* dictate whether the government must subsidize that right.[16/] As *Rust* makes clear, the government may impose significant obligations as a condition of financial aid. This Court should not revisit this well-established principle.

2. Compliance Burdens Here Do Not Materially Differ From Those In *Rust*.

The record is clear and undisputed that, in this case, the burdens imposed by the separate facilities and personnel requirements do not exceed those in *Rust*. The plaintiffs in *Rust* asserted that the burdens there were substantial, S.E.R. 101, and Petitioners have not demonstrated that the burdens involved in the legal services context are materially different in kind or degree. *See* Pet. 24a-27a. While the LSC

16/ *See, e.g., TWR*, 461 U.S. at 550 ("Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'") (*quoting Harris v. McRae*, 448 U.S. 297, 318 (1980)); *Maher v. Roe*, 432 U.S. 464, 474, 480 (1977) (holding that the economic impossibility of obtaining an abortion does not obligate government to fund the right or forego imposing threshold medical requirements to ensure that funds are spent for approved purposes).

regulations, unlike those in Rust, also require a grantee and its affiliate to be separately incorporated, Petitioners cannot show that the paperwork involved in filing incorporation papers amounts to the "straw that breaks the camel's back." This Court, after all, unanimously held in *TWR* that separate incorporation is *not* unduly burdensome. *See TWR*, 461 U.S. at 546; *id.* at 552-53 (Blackmun, J., concurring). In any event, as the district court noted and the court of appeals affirmed, Petitioners have proffered no facts showing that the separate incorporation requirement imposes any significant burden. Pet. 26a-27a; Pet. 56a. Indeed, ***all*** of the hardships which Petitioners claim they will suffer under LSC's new rules stem from the program integrity requirements, *not* from separate incorporation.[17/]

Moreover, Petitioners' description of their needs (and thus the extent of the burden) is unrealistic. They claim, for instance, that they cannot separately staff both a grantee and an affiliate at every remote location they serve, Pet. 13 n.11, but they have not explained why such staffing would be necessary. Most of the restrictions involve activities which are likely to be comparatively rare (*e.g.*, class actions) or which serve concentrated populations (*e.g.*, prisoners). Similarly, Petitioners have not offered any reason why they cannot carry out their primary lobbying activities from one or a few centralized locations. The district court found that Petitioners are capable of minimizing the burden of program

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[17/] *See* E.R. 171 (requirement that affiliate "remain sufficiently separate as to not share common offices or staff" is unduly burdensome); E.R. 185 ("compliance with the separate facilities and separate personnel requirements . . . would be all but unworkable"); *see also* Pet. 52a-53a.

integrity, and the court of appeals did not disturb this finding.[18/]

At bottom, Petitioners argue that they are constitutionally entitled to maintain their present levels of activity on all fronts in all existing locations, without having to undertake any restructuring as a result of the 1996 and 1997 Acts. *See, e.g.*, Pet. 27 n.26 (advocating mere bookkeeping separation). But that, as the court of appeals held, is not the law. *See* Pet. 26a-30a; *see also Rust*, 500 U.S. at 198 (upholding program integrity requirements that impose significant restructuring obligations as a condition for receiving Title X funding).

3. Mere Speculation About the Burden of Compliance Is No Basis For Facial Invalidation of the LSC Rules.

Petitioners' argument that the rules *might have* an unconstitutional application in some instances cannot justify reversal of the decision below. As this Court reiterated in *Finley*, legislation will not be invalidated on its face "'on the basis of its hypothetical application to situations not before the Court.'" *Finley*, 118 S. Ct. at 2177 (*quoting FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978)).[19/] The argument that LSC's program integrity rules might impose an unconstitutional burden in some circumstances must be made

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[18/] For example, because LSC's rules do not bar referrals or other discussion of restricted advocacy, centralized intake procedures and "hot lines" are permissible under Part 1610. Petitioners inexplicably and inaccurately persist in arguing that such efficiencies are prohibited, Pet. 13 n.12, despite LSC's statements to the contrary. *See, e.g.*, LSC's Ninth Circuit Brief at 31.

[19/] Although *Finley* recognized that the First Amendment overbreadth doctrine sometimes warrants an exception to this rule, Petitioners have made no overbreadth argument in this case.

in the context of an as-applied challenge raising specific facts.[20/]

In any event, Petitioners have presented no evidence supporting their assertion that LSC will interpret and apply its regulations so as to suppress speech, and the text of the regulations does not support the argument. As the court of appeals emphasized, the LSC program integrity rules do ***not*** state (as Petitioners contend) that unrestricted affiliates are limited to overlapping boards of directors and that complete separation of facilities and personnel is required. Pet. 20 n.18. The regulations make clear that a number of factors will be considered, no one factor is dispositive, and program integrity determinations will be made on a case-by-case basis.[21/] In fact, in the instances where LSC has applied its rules so far, it has considered the totality of circumstances and

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[20/] Because these rules have never been applied to Petitioners, the record is too abstract to permit an "undue burden" analysis. *See Younger v. Harris*, 401 U.S. 37, 52-53 (1971); *Texas Rural Legal Aid v. Legal Services Corp.*, 783 F. Supp. 1426, 1429 (D.D.C. 1992) (rejecting facial challenge to LSC's redistricting restriction, and holding that "[a]ny such challenge must await a concrete instance of excessive application of the rule's strictures in a given situation"). The "burden" argument advanced by Petitioners is unripe for judicial review. *See Diamond Shamrock v. Costle*, 580 F.2d 670, 674 (D.C. Cir. 1978).

[21/] Petitioners' distinction between the "hortatory" nature of the *Finley* restrictions, *see* 118 S. Ct. at 2175, and those at issue here is specious. Pet. 29 n.31. As *Rust* made clear, a case-by-case approach to program integrity is constitutional. *See Rust*, 500 U.S. at 180. The point in *Finley* was ***not*** that eligibility requirements for admission into a subsidy program ***must*** be "advisory only"; it was that the hortatory nature of such requirements indicates their viewpoint neutrality.

allowed overlapping staff as needed.[22] Indeed, the court of appeals noted *twice*, Pet. 26a, 30a, that the record contradicts Petitioners' assertions about the restriction on sharing of personnel. The Court should not grant *certiorari* in this case simply because Petitioners believe that what LSC says in its rules is not what it means, or because Petitioners "'envision the most extreme applications conceivable.'" *Finley*, 118 S. Ct. at 2179 (*quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969)).

Further, Petitioners have produced no conclusive evidence demonstrating that they will *not* be able to comply with LSC's program integrity requirements. Despite Petitioners' protests that "many programs [for the poor] will be foregone entirely, while others will be rendered far less effective" due to the rules, Pet. 22, Petitioners' affidavits show just the opposite.[23] All five grantees are funded at levels varying from $2.3 million to $4 million and receive anywhere from $637,000 to $2 million in non-LSC funding. S.E.R. 105-08. Representatives of each grantee, moreover, have affirmed

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[22] *See* LSC Motion to Enlarge Record (March 2, 1998) Exhs. 1-4. Of the four requests for affiliated status received by LSC to date, two were granted, one became moot because the application was withdrawn, and one was denied because the only separation proposed was mere bookkeeping separation. Petitioners' suggestion that LSC will tolerate only a 10% overlap of staff is false. Pet. 20 n.17. This figure is meant to serve only "as a guide" for larger grantees. Memorandum from John A. Tull, Director, LSC Office of Program Operations, to all LSC Program Directors & Board Chairs re: Certification of Program Integrity (October 30, 1997), Addendum to Petitioners' Ninth Circuit Reply Brief at 6; *see also id.* at 9 (emphasizing that "guidance on particular factors should not be considered as providing a bright-line response that would be true in all circumstances").

[23] Petitioners claim that their factual allegations of burdensomeness have gone unrebutted, Pet. 13, but their *own* facts disprove their burden argument.

these entities' ability to undertake restricted activities with non-LSC funds. S.E.R. 105-09.

If LSC's restrictions are nonetheless burdensome, it must be because a certain amount of total funding — for both restricted and non-restricted activities — is necessary to produce the "critical mass" of personnel and facilities that makes a legal services organization viable. But the government has no constitutional obligation to subsidize LSC grantees by facilitating economies of scale. After all, the *Rust* plaintiffs pressed an "economies of scale" claim before the Court, arguing that "[t]he inability of grantees to consolidate programs supported by financially segregated funds in order to facilitate the provision of health services and information to low-income women 'dilutes' effective expression . . . and violates the First Amendment." S.E.R. 101. But that argument was rejected. As *Rust* shows, if Congress wishes to avoid facilitating economies of scale, it is entitled to do so.[24/] Moreover, Petitioners' own affidavits show that the non-LSC component of each grantee's budget is sizable enough to sustain an independent organization.[25/]

[24/] Courts in other contexts have recognized that two entities are not functionally independent where they share economies of scale. *See, e.g.*, *Campbell* v. *Merit Systems Protection Bd.*, 27 F.3d 1560 (Fed. Cir. 1994); *Saudi Iron and Steel Co.* v. *United States*, 686 F. Supp. 914 (Ct. Int'l Trade 1988).

[25/] The $2 million that LASH receives from non-LSC sources, for example, is comparable to the $2.3 million *total* budget of ALSC — which no one claims is not a fully viable separate entity. Indeed, of the 274 programs nationwide in which complete 1996 data is available, 129 grantees had total operating budgets of approximately $1 million or less. S.E.R. 86-87. And even the approximately $637,000 non-LSC contribution received by LASOC — the lowest such contribution among the Petitioners — exceeds the total operating budget of 66 LSC grantees operating elsewhere in the country. S.E.R. 87.

C. Because LSC's Rules Provide An Adequate Alternative Avenue For Protected Advocacy, They Do Not Restrict First Amendment Rights And Are Not Subject To Strict Scrutiny.

Petitioners urge this Court to grant their petition because of a purported need "to clarify the legal standard for determining when a restriction on the use of federal funds represents an unconstitutional condition." Pet. 22. However, this Court has already articulated a clear standard for gauging the constitutionality of government restrictions on subsidy programs. The "adequate alternative channels" test articulated and applied in *TWR*, *League of Women Voters*, and *Rust* is the threshold inquiry that differentiates between limitations on the scope of government subsidy programs and limitations that restrict constitutional rights. Only the latter are subject to strict scrutiny.

TWR states the general rule: "Congressional selection of particular entities or persons for entitlement to [Government] largesse 'is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find.'" 461 U.S. at 549. The "circumstances" to which the Court referred are those in which the funding restrictions imposed by the Government fail to provide adequate alternative channels for protected activities based on non-government funds. Because such channels existed in *TWR*, the Court found that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying." *Id.* at 546. As Justice Blackmun explained, "[a] § 501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities." *Id.* at 553 (Blackmun, J., concurring).

Petitioners are essentially asking the Court to abandon this standard and replace it with a "strict scrutiny" or "compelling interest" standard. Given the clarity with which *TWR* and *Rust* speak to the issue,[26] it is no wonder that Petitioners have distanced themselves from the term "strict scrutiny,"[27] and have transparently reformulated their argument into a "no more restrictive than necessary test" or an ambiguous "stringent level of scrutiny" test. Pet. 24, 29.

A "less restrictive alternative" test is completely unsupported by this Court's unconstitutional conditions jurisprudence. There is no discussion in *TWR* or *Rust* of "less restrictive alternatives" or alternatives precisely geared to the specificity of the government's message.[28] The Court did

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[26] Indeed, the Court in *TWR* explicitly rejected strict scrutiny. 461 U.S. at 549.

[27] Petitioners' contention that the court below *mischaracterized* their argument as a strict scrutiny test, Pet. 24, is patently false. Petitioners explicitly requested the court to apply strict scrutiny, and it appropriately refused to do so. *See* Appellants' Opening Brief at 25 (the unconstitutional conditions doctrine requires that government restrictions on subsidy programs be "subject to strict scrutiny and . . . be no broader than necessary to protect a compelling governmental interest"); *id.* at 31 n.21 ("the logic of [*TWR*, *League of Women Voters*, and *Rust*] is . . . consistent with strict scrutiny").

[28] In *League of Women Voters*, the Court simply required some alternative less restrictive than a total ban on speech. Indeed, the Court suggested that the statute at issue there would have been constitutional if noncommercial stations had the option of setting up an affiliate to editorialize. As a practical matter, the court invalidated the FCC subsidy because of a clear distinction in the facts as compared to *Rust* and *TWR*. In *League of Women Voters*, the restricted entity — the noncommercial television station or radio station — was also the *exclusive* possessor of the essential facility that made communication possible: a broadcast license.

(continued...)

recognize that the government's interest in each case — avoiding subsidization or the appearance of endorsement of lobbying and abortion, respectively — was legitimate, *see* 461 U.S. at 546; 500 U.S. at 193, but nowhere did the Court find it necessary to determine whether those interests would have been sufficient under strict scrutiny. Nor did the Court ask whether the government's interests could have been satisfied through less restrictive means.

In fact, in both *TWR* and *Rust,* less restrictive alternatives were clearly available. Petitioners claim that in *TWR* it was "*necessary* to require charitable groups to establish two legally distinct organizations." Pet. 25. However, Congress could have simply required that § 501(c)(3) corporations keep separate accounts for lobbying and non-lobbying activities, and eliminated any tax deduction for contributions to the lobbying account.[29/] The less restrictive "mere bookkeeping" alternative was similarly available in *Rust*.[30/]

[28/](...continued)
It would thus do no good to tell the station that it could set up a second entity to do its editorializing, unless that entity could use the station's license for that purpose. Because the restriction was coextensive with the opportunity to speak (*i.e.*, the possession of a license), there was no meaningful alternative channel for protected speech, and the condition was therefore unconstitutional.

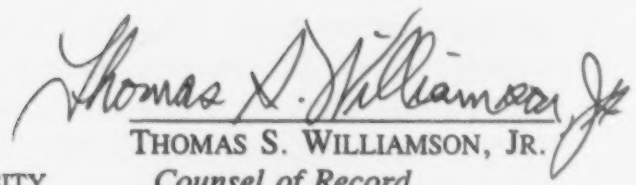
[29/] This is particularly true if one accepts Petitioners' twofold argument that (a) Congress's interest is limited "to insur[ing] that [its] funds . . . [are] used to support only the activities that Congress [is] willing to have subsidized," Pet. 25, and (b) Congress is *not* entitled to prevent misperceptions about the use of those funds unless it is delivering a pointed government message. After all, there was no specific articulable government message in *TWR*.

[30/] The *Rust* Court did find in a footnote that "the regulations are narrowly tailored to fit Congress' intent in Title X that federal funds not (continued...)

CONCLUSION

For the reasons set forth herein, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,



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[20](...continued)
be used to 'promote or advocate' abortion as a 'method of family planning.'" 500 U.S. at 195 n.1 The Court did not suggest that such narrow tailoring was *required*, however, and a footnote would be a strange place to put the point if it was in fact determinative of the case. In any event, if this footnote represents strict scrutiny, then it is a holding that "mere bookkeeping" separation is insufficient to satisfy Congress's interest in limiting a subsidized program, and that Congress may require separation of facilitates and staff in order to ensure that no cross-subsidization or perception of subsidization occurs.